Neutral Citation Number: [2009] EWHC 1142 (Comm)
Case No: 2009 FOLIO NO 60

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
21/05/2009

B e f o r e :

THE HONOURABLE MR JUSTICE COOKE

Between:
CLASSIC MARITIME INC
Claimant
- and -

(1) LION DIVERSIFIED HOLDINGS BERHAD
(2) LIMBUNGAN MAKMUR SDN BHD
Defendants

Mr R Southern QC and Mr R Sarll (instructed by Winter Scott) for the Claimants
Mr V Flynn QC and Mr D Walker (instructed by Kennedys) for the Defendants
Hearing dates: 14 and 19 May 2009

HTML VERSION OF JUDGMENT

Mr Justice Cooke :

Introduction

1. I have a number of applications to decide in this action. The claimants (Classic) seek summary judgment against both defendants. The second defendant (Limbungan) seeks a stay of the action so that the dispute between it and Classic can be decided in arbitration in accordance with an arbitration clause contained in a Contract of Affreightment (COA) and the first defendant (Lion) seeks a stay on case management grounds.

2. Classic brings the action against Lion under a written guarantee dated 28th August 2008 by which it guaranteed the obligations of its subsidiary, Limbungan, under the COA contained in or evidenced by an email Recap dated 13th August 2008 (the August COA) which in turn incorporated an earlier July COA.

3. Lion raises two defences to the claim. First it says that the guarantee is unenforceable because any consideration given was past consideration. Secondly it says that performance of the COA was frustrated in part, inasmuch as it was unable to discharge the ships on two nominated voyages in Malaysia, or that performance of those shipments was excused under the force majeure clause in the COA. A challenge is also raised to the quantum of the claim in respect of these two voyages which has been put forward on the basis of the difference between the equivalent time charter rate for the COA and the Baltic Capesize Index setting out the market rate at the relevant time.

Limbungan's Application for a Stay

4. There is no issue between the parties that Limbungan was party to an arbitration agreement with Classic contained in the documents making up the August COA, as set out in the Recap for that COA, the Recap for the July COA and the Charterparty document incorporated in both. The issue between the parties is whether Limbungan has agreed to vary that arbitration agreement by virtue of the guarantee given by Lion to Classic or in the negotiations for that guarantee, or has represented in the guarantee or negotiations that it would accept the English court's jurisdiction, either instead of or in addition to the provision for disputes to be resolved by arbitration.

5. This is an issue with which this court must grapple since it must, under section 9 of the Arbitration Act, decide whether the arbitration agreement is null and void, inoperative or incapable of being performed, if it is not to stay the action in favour of arbitration. The issue turns on the construction and effect of the guarantee given by Lion and some email negotiations and in particular whether Limbungan is bound, in one way or another by the contents of a clause in the guarantee.

6. Classic relies on the terms of the guarantee which includes the following provisions:-

"The Guarantor's obligations under this guarantee are independent of Limbungan Makmur Sdn Bhd's obligations under the Charterparty. The Counterparty may bring and prosecute separate actions against Classic Maritime Inc. and the Guarantor or may join the Guarantor and Limbungan Makmur Sdn Bhd in one action.

……

THIS GUARANTEE SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH ENGLISH LAW WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAWS. THE GUARANTOR IRREVOCABLY SUBMITS TO THE NON-EXCLUSIVE JURISDICTION OF AND AGREES THAT ANY ACTION TO ENFORCE THIS GUARANTEE MAY BE DETERMINED BY THE COURTS OF ENGLAND AND WAIVES ANY OBJECTION TO THE ENGLISH COURTS ON THE GROUNDS OF INCONVENIENT FORUM OR OTHERWISE IN CONNECTION WITH THIS GUARANTEE. IN ANY ACTION TO ENFORCE THIS GUARANTEE THE GUARANTOR AGREES TO ACCEPT, IN LIEU OF PERSONAL SERVICE, SERVICE OF PROCESS BY POSTAGE PREPAID REGISTERED OR CERTIFIED MAIL, RETURN RECEIPT REQUESTED, TO THE GUARANTOR AT THE ADDRESS SPECIFIED PURSUANT TO THE NOTICE PROVISIONS OF THIS GUARANTEE."

7. Although infelicitously drafted, it is clear that the reference to "the Counterparty" in the first paragraph set out above means Classic and that where, in the second sentence, the Counterparty

is referred to as bringing separate actions against Classic Maritime and the Guarantor, the reference should be to Limbungan and the Guarantor since the sentence goes on to refer to the entitlement to join the Guarantor and Limbungan in the same action. Classic relies on this provision which, on its face, gives Classic the right to sue Limbungan and Lion in the same action whilst the later paragraph cited above sets out the agreement of Lion to submit to the jurisdiction of the English court. Putting the two together, Classic says that it is entitled to sue Limbungan and Lion jointly in the English court, although I was unclear whether it went so far as to say that it could pursue Limbungan on its own there, though that must be the logic of its position if Limbungan, as opposed to Lion, is bound by the provision.

8. Classic submits that, as the guarantee was given pursuant to the terms of the August COA, it was therefore procured by Limbungan and Limbungan must have impliedly agreed that it could be sued in the English courts alongside the Guarantor, Lion, at Classic's option, thereby varying the arbitration clause in the COA. It is further suggested that Limbungan must be taken to have represented that it would not object to being sued in the English courts, even if it was not party to an implied agreement. If Classic is right on either point, then Limbungan has agreed to be sued or represented that it may be sued in the English court either separately or jointly with Lion.

9. I cannot imply any such agreement from the material put before the court. Such an agreement cannot lightly be implied, whether from words or conduct. The burden of proof must rest upon Classic in this regard to show the necessity for any such implied contract, as exemplified in The Aramis [1989] 1 Lloyd's Rep 213, The Hannah Blumenthal [1983] AC 854 and The Gudermes [1993] 1 Lloyd's Rep 311.

10. Although the negotiation of the interlinked July and August COAs are inadmissible for the purpose of construing them, they must be of significance in assessing whether some implied contract has been agreed. The negotiations for the July COA show discussion of an arbitration clause and rival positions as between the parties as to the seat of that arbitration, namely London or Singapore. London arbitration was then specifically agreed as set out in the fixture Recap, which also included the provision for the obligations of Limbungan to be fully guaranteed by Lion Industries Corporation Berhad, (Lion Industries) which was not the company which ultimately actually gave the guarantee.

11. On 11th August 2008 Classic sent to Captain Khor, a senior manager in the Shipping and Chartering Department of LDH Management Sdn Bhd a draft of the guarantee to be given under the July COA and on 14th August a draft of the guarantee to be given under the August COA. In each case the heading of the email referred to the relevant "Limbungan/Classic COA" and stated:

> "As per main terms agreed, attached please find guarantee wording which kindly get Lion Industries to affect in accordance with Charterparty. Please confirm when same will be affected."

12. In an email dated 18th August Limbungan's brokers forwarded to Captain Khor a draft email to go to the owners which included corrections to the draft guarantee drafted by the "Chtrs Legal Dept". From this it is to be inferred that there was discussion of the terms of the guarantee between the legal department acting for "Charterers" and Limbungan and the terms of the guarantee itself were negotiated between persons acting for Limbungan and Classic. In due course the agreed form was put before the Lion company for signature, at the behest of Limbungan, albeit that, by that time, the guarantor was to be Lion rather than Lion Industries.

13. On this basis it is submitted by Mr Richard Southern QC for Classic that Limbungan must be taken to have agreed the terms of the guarantee to be given by the guarantor with the inclusion of the provision allowing Classic to bring and prosecute separate actions against Limbungan and Lion or joining both in one action. Thus, it is said that Limbungan agreed to be sued in an action and specifically agreed to be sued jointly in an action with Lion which, by the terms of the

guarantee itself, accepted the jurisdiction of the English courts.

14. I cannot accept this submission. There is no allegation that Lion acted as agent for Limbungan in entering into the guarantee. The guarantee is in itself specifically an agreement between Classic and Lion to which Limbungan is not a party whether or not Charterers' legal department is Limbungan's legal department or a legal department which acts for numerous members of the Lion Group. Whether or not the form of the guarantee was negotiated between Limbungan and Classic, there is no basis for construing negotiations or the guarantee as amounting to an agreement on the part of Limbungan itself to the terms of a clause in a document to which it was not a party. For the same reasons it cannot be said that there is a representation made on behalf of Limbungan when forwarding a document which is to take effect between Classic and Lion, once executed by them.

15. Both the July and August COAs were concluded with the arbitration clause in each, at a time when a draft of the guarantee to be given by a Lion company had been furnished but not agreed, with its proposed clauses.

16. The terms of the paragraphs quoted above in the guarantee between Lion and Classic are not, in my judgment apt to oust the arbitration agreement in the COAs between Limbungan and Classic. As Mr Vernon Flynn QC submitted on behalf of Limbungan, the terms of the guarantee go to some length to provide that the obligations of Lion to pay are to be treated independently of those of Limbungan, not only in the first provision set out above but also in the preceding paragraphs of clause 2 of the guarantee which read as follows:-

"2. Guarantees and promises to pay to Classic Maritime Inc., on demand, any and all amounts (the "Obligations") that Limbungan Makmur Sdn Bhd becomes obligated to pay to Classic Maritime Inc. as a result of Limbungan Makmur Sdn Bhd's failure to perform its obligations or otherwise under the Charterparty when each of the Obligations becomes due, and guarantee that if any payment that Limbungan Makmur Sdn Bhd makes to Classic Maritime Inc. on account of the Obligations is recovered from or is repaid by Commodities in any bankruptcy, insolvency or similar proceeding instituted by or against the Classic Maritime In., then this guarantee will continue to apply to those Obligations to the same extent as though the payment so recovered or repaid never had been made or received.

This is (a) a guarantee of payment and not of collection and (b) a continuing, absolute and irrevocable guarantee irrespective of (i) any release of or granting of time or any other indulgence to the Obligor and (ii) any other circumstance which might constitute a defense available to, or a legal or equitable discharge of, a guarantor under a guarantee given by it."

17. As Mr Flynn submitted, Lion's liability to Classic does not accrue until such time as Limbungan becomes obliged to make a payment to Classic under the August COA but once that has occurred, Lion has an obligation to pay Classic which is independent of Limbungan's obligation to pay so that Classic is entitled to sue both Lion and Limbungan. Under the terms of the guarantee it may do so either in the same action or separate actions but Classic is also entitled to proceed to enforce Lion's obligation without having first to pursue Limbungan, to realise any other security or pursue any other remedy. Of course Classic would have to establish, in its claim against Lion, that Limbungan had been obligated to make a payment to Classic under the August COA, for the guarantee to be triggered. Although this would be the position under English law anyway it is perhaps not surprising that the parties wished to state the position expressly for the avoidance of doubt, but none of this can affect the specific arbitration clause in the COA with Limbungan.

18. Whilst Lion may agree that actions can be pursued against Limbungan and itself separately or together and itself agree to English jurisdiction, it did not purport to commit Limbungan to

that and there is no basis for suggesting that Limbungan itself agreed to it. Lion was expressing its willingness to be sued independently or jointly with Limbungan but I do not see how that can be said to be binding on Limbungan. The thrust of the paragraphs quoted is to deal with the independence of any suit against Lion, to which it agrees and though it also agrees to be jointly sued with Limbungan, this cannot affect Limbungan's right to insist on arbitration which is contained in the contract to which it is a party.

19. For the same reasons there is no evidence of any independent representation made by Limbungan that it consented to be pursued in the courts in England, as opposed to arbitration. Limbungan is neither a party to the guarantee nor party to any representation or unequivocal promise which could give rise to any estoppel which would prevent it relying on the arbitration provisions of the COA: nor is there anything which would give rise to that result. The ingredients for such an estoppel, such as a reliance and unconsionability are not put forward nor established in any event.

20. It follows therefore that the claim against Limbungan must be stayed because it arises under the August COA and it must therefore be referred to arbitration in accordance with the parties' agreement which is valid.

Is Lion entitled to a stay on case management grounds?

21. The basis of Lion's application for a stay was as follows. Limbungan intends to institute arbitration proceedings against Classic, if Classic does not do so. In those proceedings liability would be contested by Limbungan on the ground of frustration/force majeure and Limbungan would be looking to test whether Classic took appropriate steps to mitigate its loss, whilst also challenging the quantum of its claim for damages. In such circumstances, self-evidently, the extent of Lion's liability to Classic under the guarantee would involve the self same considerations as those which would have to be determined in the Classic/Limbungan arbitration. If there were separate proceedings in this country against Lion, there would be a risk of inconsistent decisions and in consequence there should be a stay of the proceedings against Lion pending the conclusion of the arbitration between Classic and Limbungan.

22. The gravamen of the submission is the risk of inconsistent decisions by this court and the arbitral tribunal – a factor which the court is apt to take into account when considering proceedings in rival jurisdictions between the same parties and which can even amount to a "strong reason" for the Court not enforcing an exclusive jurisdiction clause.

23. Here however, a stay would achieve the very opposite of what was envisaged by the terms of the guarantee to which I have already drawn attention, which provide for the obligations of the guarantor to be considered independently of those of Limbungan. Lion specifically agreed that separate actions could be brought against it and Limbungan and could be submitted to the non-exclusive jurisdiction of the English court. Whilst it also agreed to Classic joining it and Limbungan in one action, it is its own subsidiary, Limbungan which has, in this court, insisted on its separate right to arbitration. If it, as a subsidiary of Lion, and Lion itself, were anxious to avoid the risk of inconsistent decisions, the solution lay in their own hands, namely by Limbungan agreeing to the English court's jurisdiction. What Lion and its subsidiary Limbungan are seeking to do before this court is to uphold the arbitration agreement in the August COA, so that Limbungan cannot be sued in these courts whilst Lion evades its own agreement to the jurisdiction of this court on supposedly case management grounds. Limbungan and Lion want to preserve Limbungan's right to arbitrate with Classic under Limbungan's agreement with Classic but to override Classic's right to litigate with Lion in these courts under its contract with Lion. That will not do.

24. Moreover, it is common ground between the parties that the decision of an arbitral tribunal in the dispute between Classic and Limbungan would not be binding as between Classic and

Lion. Lion's offer of an agreement to be bound by the arbitration award merely accentuates its desire to avoid the effect of the jurisdiction clause in the guarantee of which Classic is entitled to take advantage.

25. Classic is entitled to come before this court and to make its claim for summary judgment without delay and, if entitled to summary judgment, that in itself would constitute a good reason for the absence of any stay on case management grounds.

26. In my judgment therefore there is no good reason, whether for case management purposes or otherwise, why this court should prevent Classic from pursuing its claim against Lion. If well grounded, it is entitled to speedy judgment, regardless of the position of Limbungan and any arbitration proceedings which may be pursued against it. The specific agreement to the separateness of the obligations of Limbungan and the separateness of the proceedings are extremely cogent reasons against the stay sought. I therefore refuse Lion's application.

Classic's application for summary judgment against Lion

27. The court has to determine whether or not Lion has a "real prospect of successfully defending the claim or issue" within the meaning of CPR 24.2(a)(ii). It is not suggested by Lion here that there is any other compelling reason why the case or issue should be disposed of at a trial. A real prospect of success is one which is "not fanciful" and is better than merely arguable. Lion relied upon the dictum of Lord Hope in Three Rivers DC v Bank of England (No 3) [2001] 2 All ER 513, the usual passage cited to the court in connection with summary judgment applications, at paragraph 95. Lion said that this was one of the more complex cases which was unlikely to be capable of being resolved without conducting a mini trial on documents, without disclosure and oral evidence and that this did not fall within the object of the rule, which was designed to deal with cases that were unfit for trial at all. It was said that the issues which Lion raises involve complex questions of law and issues of fact which cannot be decided on an application for summary judgment.

28. In order to establish entitlement to summary judgment against Lion, Classic has to establish the validity of the guarantee which has been called in question by Lion on the basis that any consideration given for it was past. Classic also has to establish that Limbungan failed to perform its obligations under the August COA when such obligations became due in order to trigger the guarantee. Because of the terms of the guarantee itself, Classic does not have to pursue or succeed in any claim against Limbungan, as the guarantee specifically provides that Lion's obligations under the guarantee are independent of Limbungan and there is a waiver of any right to require Classic Maritime to proceed against Limbungan or pursue any other remedy.

29. The recap email for the July COA was sent on 29th July and set out the parties as Classic Maritime and Limbungan with a passage in parenthesis reading "the performance of Limbungan to be fully guaranteed by Lion Industries Corporation Berhad and a performance guarantee notarised and signed by an authorised signatory to be issued". The recap telex for the August COA was sent on 13th August 2008 expressly incorporating the terms of the July COA.

30. Limbungan was a wholly owned subsidiary of Lion DRI Sdn Berhad which itself was wholly owned by Lion in which Lion Industries held a 20% shareholding.

31. On 11th and 14th August 2008 Classic forwarded draft guarantees for the July and August Charterparties respectively to Limbungan via the brokers. Each included the English jurisdiction clause. According to the evidence, at some stage in late August, prior to company board meetings on August 28th, the executive director of Lion Industries and Lion took the view that, as a matter of Malaysian law it was not permissible for Lion Industries to guarantee the performance of Limbungan's obligations because under the Listing Rules of the Malaysian Bursa, on which both Lion and Lion Industries were listed, a listed entity could not give a guarantee in respect of the

obligations of another company unless that company was a subsidiary. Limbungan was not a subsidiary of Lion Industries but was a subsidiary of Lion, as set out above. The executive director therefore put forward Lion as the guarantor but Classic was not informed of the reason for this.

32. At a board meeting on 28th August 2008 the Board of Lion approved the issue of the guarantee and following chasers from Classic, at some date between 25th and 30th September, the draft guarantees for the July and August COAs were amended so that the identity of the guarantor was changed from Lion Industries to Lion and they were duly signed by the executive director. He did not however affix the company stamp nor did he date the guarantees, identify himself or state his position or have the guarantees notarised.

33. It was on 30th September 2009 that the guarantees were sent to Classic and later that day Classic complained that they did not state the name and position of the signatory and that there was no notarisation confirming his authority.

34. It was on 15th October 2008 that the company stamp and details of the executive director's position were added and the guarantees were dated 28th August because that was the date of the board meeting of Lion which approved the guarantees. These stamped guarantees appear to have reached Limbungan's/Lion's brokers but not reached Classic.

Past Consideration

35. Lion's argument that there was no valid consideration and only past consideration hangs upon the opening words of the guarantee itself, which reads as follows:

"In order to induce Classic Maritime Inc. to enter into a contract of affreightment dated 13th August 2008 (the "Contract") with Limbungan Makmur Sdn Bhd of Kuala Lumpur, Malaysia, the undersigned (the "Guarantor"):

1. Represents that it owns, directly or indirectly, all of the equity interests in Limbungan Makmur Sdn Bhd and, accordingly, benefit from Classic Maritime Inc's entering into and performing its obligations under the Charterparty, and

2. Guarantees and promises to pay to Classic Maritime Inc., on demand, any and all amounts (the "Obligations") that Limbungan Makmur Sdn Bhd becomes obligated to pay to Classic Maritime Inc. as a result of Limbungan Makmur Sdn Bhd's failure to perform its obligations or otherwise under the Charterparty when each of the Obligations becomes due."

36. As already mentioned, the date of this guarantee is 28th August 2008 and the opening wording refers to the inducement of the contract of affreightment dated 13th August 2008, 15 days earlier. Lion submits that the guarantee, on its face, therefore refers to past consideration and it is therefore unenforceable. Moreover, Lion maintains that it is inadmissible to look at extrinsic evidence to show other consideration.

37. This argument is totally devoid of commercial sense and, I am glad to say, wrong as a matter of legal analysis.

38. The Recap for the August COA stated that the COA was for the account of Limbungan but that its performance was to be fully guaranteed by Lion Industries. Limbungan was therefore under an obligation to procure such a guarantee from Lion Industries. The terms of the guarantee had not been negotiated at that stage but Limbungan had undertaken an obligation which was enforceable. There can be no doubt that if no guarantee from Lion Industries had been forthcoming (or from a suitable alternative as subsequently agreed) Classic would have been under no duty to fulfil the COA. Limbungan's capital apparently amounted to about 40p.

Although it was argued by Lion that it was taken by surprise by an argument that the guarantee was a condition precedent to performance under the COA and that issues of factual evidence with regard to waiver, matrix, market conditions, knowledge of the parties and significance could arise, in my judgment, it is plain, as a matter of commercial construction of the COA that the guarantee was an essential part of the bargain made with Limbungan. I cannot see the need for any prior notice to raise such a point, as a matter of law, nor how any facts which could be adduced in evidence could have any impact on this point which stares one in the face when looking at the terms of the COAs. Nor is there any realistic prospect of establishing any waiver for all time of such a condition precedent. The nomination of a vessel on 22nd August by Classic whilst at the time seeking to agree wording of the guarantee cannot constitute a waiver of any kind.

39. By the very nature of the July and August COAs, which each provided for four shipments a year for periods of five and a quarter and 6 years respectively, with a total value in excess of $300 million, and the limited financial standing of Limbungan, a provision for a guarantee in such agreements must be considered so fundamental to them that the obligation to provide the guarantee amounts to a condition precedent to performance by Classic. This is a similar situation to that set out in Trans Trust v Danubian Trading [1952] 2 QB 297 where Denning LJ found that the provision of a bankers' confirmed letter of credit was an essential term of the contract of sale and had to be seen as a condition precedent to the obligation of the seller to deliver the goods. There, if the buyer failed to provide the credit, the seller could treat himself as discharged from any further performance of the contract and could sue the buyer for damages for not providing the credit.

40. When therefore, on its own case, it was subsequently discovered that Lion Industries could not give the guarantee, Limbungan would not have been able to enforce the COAs in the absence of an agreement by Classic to a substitute guarantee.

41. When Classic accepted a substitute guarantee from Lion in place of the guarantee which Limbungan was obliged to procure from Lion Industries, Classic plainly gave up the right to sue Limbungan in respect of the failure to provide a guarantee from Lion Industries. This was plainly good consideration and no argument about illegality could avail Limbungan in respect of its failure to produce that guarantee from Lion Industries, particularly in view of the discussions in the course of negotiations which involved other Lion companies potentially giving the guarantees. Limbungan settled on Lion Industries and it was entirely its problem, if and when it was later discovered that Lion Industries was in no position to provide the guarantee as a matter of Malaysian law. Even if an argument was available to Limbungan in that respect, it cannot be doubted that there was good consideration in Classic giving up the potential right to sue Limbungan for the failure, when accepting the guarantee from Lion instead of that from Lion Industries. Consideration moved from Classic, the promisee, because it gave up its right against Limbungan in exchange for obtaining a right to sue Lion under the guarantee.

42. Furthermore, even if the guarantee had been given by the entity named in the August COA, there would then have been good consideration since, when accepting the guarantee, Classic would be taken to have discharged Limbungan from its obligation to provide one. Once again consideration would move from the promisee in giving up that right.

43. The reality is that the guarantee was given as part and parcel of a single transaction, since it was specifically required by the August COA. There was no subsequent demand for a guarantee to be given, because it was already provided for in that COA. Consideration moved from Classic as the promisee in the context of the transaction as a whole. As originally set out in the August COA, the obligations undertaken by Classic were good consideration for the obligations undertaken by Limbungan, including the obligation to procure the guarantee. When the guarantee was given pursuant to Limbungan's obligations, (whether varied or not by the substitution of a

different guarantor) the consideration it had in mind for the guarantee was the fulfilment by Classic of its obligations under the August COA. When Classic tendered performance for the first two voyages of the August COA by nominating the performing vessels and arranging for them to sail to the load ports, it was fulfilling its obligations under the August COA as part and parcel of the single transaction which included the guarantee. The performance of those obligations towards Limbungan in itself amounted to good consideration in relation to the third party guarantor, Lion.

44. In paragraph 1 of the guarantee dated 28th August 2008, Lion represents that, by reason of its shareholdings in Limbungan, it benefits from Classic's performance of its obligations under the August COA. Presumably such benefit to a parent company is one of the reasons which could be put forward for the requirement suggested by Lion for a guarantee to be given only by a parent company. Regardless of that, there is no doubt that the clause specifically states that Lion benefits not only from Classic entering into the COA with Limbungan but also from performing its obligations under it and in those circumstances there can be no doubt that the future performance of the COA after 28th September, as actually occurred, does amount to good consideration moving from Classic.

45. Furthermore, although the guarantee is dated 28th August and refers to the contract of affreightment already concluded on 13th August, there is an artificiality about Lion's argument, simply because the first few lines of the guarantee refer to the representations being made and the guarantee being given in order to induce Classic to enter into that COA. What is actually being stated is that the guarantee, whatever the date of its execution, operates to induce the conclusion of the COA. The reality of course is that it is part of a single transaction where the obligation to obtain the guarantee rested on the subsidiary Limbungan as at 13th August and the guarantee was executed pursuant to that obligation. The promise of the future guarantee did induce Classic to enter the COA. It is merely that the guarantee itself, instead of being dated 13th August, is dated 28th August. Because of the closeness of parent and subsidiary, as referred to in the guarantee itself, there can be no doubt that the guarantee forms part and parcel of the single transaction and that, whatever the wording of the guarantee, it was provided by Lion, because without it, the transaction could not go ahead.

46. In Chitty on Contracts (30th Edition) paragraph 3-027 it is stated that, in determining whether consideration is past, the courts are not bound to apply a strictly chronological test. If the giving of the consideration and the making of the promise are substantially one transaction, the exact order in which these events occur is not decisive. It was accepted by Lion that the issue of a single transaction is always a question of degree but that what was envisaged by the authors was the case where the same parties were involved throughout. That does not however appear to me to be a sufficient answer to the point. It is the exchange of one obligation from one party for another from a different party which, in any event, changes the analysis, as set out earlier in this judgment.

47. There was argument about the decision of the Privy Council Pao on v Lau Yiu Long [1980] AC 614 and the statement in the judgment of the Board at page 631 that extrinsic evidence is admissible to prove the real consideration in three circumstances. The first is where no consideration or a nominal consideration is expressed in the instrument, which is not this case. The second is where the express consideration is in general terms or ambiguously stated. The third is where a substantial consideration is stated but an additional consideration exists which is not inconsistent with the terms of the written instrument. Lion submitted that, because the guarantee referred to the inducement of the COA by it, any reference to present or future consideration was inconsistent with that past consideration and could therefore not be admitted. I cannot accept this submission. The inconsistency arises in the terms of the guarantee itself because an instrument dated 28th August 2008 is said to induce a contract of affreightment dated 13th August 2008. Given that, there is plainly room for reference to extrinsic evidence to clarify

the anomaly. The guarantee, if executed on 28th August, without any prior commitment on the part of Lion could not induce the conclusion of the COA on 13th August. That in itself therefore could not be consideration at all, let alone past consideration. Since the guarantee refers to the benefit to Lion from Classic's performance of the obligations, there is reference to future consideration within the terms of the guarantee and the other matters to which I have already referred, insofar as they constitute additional consideration, are not inconsistent with that. As stated in Halsburys Laws of Evidence 4th Edition Volume 12, as current in 1975, paragraph 1487:

"It is not in contradiction to the instrument to prove a larger consideration than that which is stated."

48. Frith v Frith [1906] AC 254 and the reference in it to Clifford v Turrell at pages 258-259 established that where there is one consideration stated, extrinsic evidence is allowed to prove any other consideration which existed and it is not in contradiction to the instrument to prove a larger consideration than that which is stated.

Force majeure and frustration

49. Clause 32 of the detailed COA terms provides as follows:-

"Neither the vessel, master or owners, nor the charterers, shippers or receivers shall be responsible for loss or damage to, or failure to supply, load, discharge or deliver the cargo resulting from….intervention of sanitary, customs or other constituted authorities….or any other causes beyond the owners, charterers, shippers or receivers' control; always provided that any such events directly affect the performance of either party under this charterparty."

50. There was no disagreement between the parties on the test for frustration, as enunciated in a series of authorities, including the classic definition by Lord Radcliffe in Davis Contractors v Fareham UDC [1956] AC 696 at 728:-

"….frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do. … It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

51. It was common ground that a supervening event, in order to frustrate the future performance of the contract, had to be one which so significantly changed the nature and not merely the expense or onerousness of the outstanding contractual obligations from what the parties could reasonably have contemplated at the time of the conclusion of the contract that it would be unjust to hold them to their stipulations in the new circumstances. The claimants relied upon a dictum of Lord Simon in British Movietonenews v London and District Cinemas [1952] AC 166, at page 187:-

"It is of the utmost importance that the action of a court, when it decides that in view of a supervening situation the rights and obligations under a contract have automatically ceased, should not be misunderstood. The suggestion that an "uncontemplated turn of events" is enough to enable a court to substitute its notion of what is "just and reasonable" for the contract as it stands, even though there is no "frustrating event," appears to be likely to lead to some misunderstanding. The parties to an executory contract are often faced, in the course of carrying

it out, with a turn of events which they did not at all anticipate – a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point – not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation."

52. The frustration of a COA was considered by the House of Lords in Larrinaga & Co v Société Franco Américaine des Phosphates (1923) 14 LlLRep 457 where a COA had been agreed in April 1913 for the carriage of six cargos of phosphate in 1918-1920. (There was another contract for carriage in the intermediate period.) The parties agreed that the first three voyages in 1918 should not take place either because it was too dangerous to take a vessel to the disport or because all available ships had been requisitioned as a result of the First World War. By mid 1919 however tonnage was available but the owners claimed frustration. The arbitrators rejected this argument and were ultimately upheld in the House of Lords. Because this was a forward contract, with an intervening period of five years before shipments were to begin, the House of Lords regarded this as a case where the parties took the risk of alteration in the circumstances, so that, if there was no legal prohibition and no physical impossibility of performance, it could not be said that performance of the last three voyages remaining in 1919 and 1920 was frustrated.

"In effect, most forward contracts can be regarded as a form of commercial insurance in which every event is intended to be at the risk of one party or another. Each party is likely most to need the maintenance of such a contract exactly when the other would most wish to be rid of it. … All the uncertainties of a commercial contract can ultimately be expressed, though not very accurately, in terms of money, and rarely, if ever, is it a ground for inferring frustration of an adventure, that the contract has turned out to be a loss or even a commercial disaster for somebody. If a contract is really a speculative contract, as this plainly is, the doctrine of frustration can rarely, if ever, apply to it, for the basis of a speculative contract is to distribute all the risks on one side or on the other and to eliminate any chance of the contract falling to the ground, unless, indeed, the law has put an end to it. … No one can tell how long a spell of commercial depression may last; no suspense can be more harassing than the vagaries of foreign exchanges: but contracts are made for the purpose of fixing the incidence of such risks in advance, and their occurrence only makes it the more necessary to uphold a contract and not to make them the ground for discharging it." (Lord Sumner at page 464)

53. The House of Lords held that there was one contract providing for six shipments over the three years but that the contract dealt with six wholly distinct separate and severable adventures between which there was no dependence in the sense that the carrying out of any one of them was made to depend in any way upon the carrying out of or abandonment of any of the others. Thus each shipment was capable of being cancelled and performance of it frustrated though none were in that case.

54. Classic submitted that the crisis in the world economy in 2008 and the unprecedented and unforeseen scale and speed with which it unfolded were nothing to the point, despite the effect on the market for steel products generally and the business of the Lion Group in particular. Lion's contention was that the unprecedented and unforeseen collapse in the demand for steel products meant that the Lion Group storage yards at Labuan and Port Kelang, the two named disports in the COA, became full. As there was nowhere else to store iron ore at those ports, it became impossible for the iron ore which was scheduled to be delivered by the first two voyages under the August COA to be discharged at either of the discharging ports so that Limbungan was entitled to cancel the first two voyages, as it did on 4th November 2008, following the nominations of the two ships by Classic on 30th September and their acceptance by Limbungan

the same day. The cancelling emails said "the plants cannot handle the additional stock both from a lack of production and a lack of storage capacity" and "we have agreed with our supplier to defer the shipment of iron ore which was due to take place in November 2008", maintaining that they no longer required either vessel to deliver the contractual iron ore.

55. Lion's case was that these two shipments had become impossible to perform according to the terms of the charter. Lion did not contend that there was such a radical change of the contract generally that it was entirely frustrated but maintained that it had become physically impossible actually to discharge these two vessels at the contractual discharging ports, by reason of the prevailing conditions. The key paragraphs of the evidence produced at the hearing were paragraphs 49.2-49.9 of the second statement of Mr Joiner, a partner in the solicitors firm representing the defendants. What was there said was that the Lion Group had storage yards at each of the two discharge ports and that those yards were specially designed and strengthened in order to take the weight of bulk iron ore pellets, without which the iron ore would sink in the ground. The normal practice was to schedule the arrival of cargos so that, at any given time, the storage yards would obtain sufficient raw material for two to three months' production. In consequence of the reduction in demand, the Lion Group began to reduce production and, as a result, the raw material in the yards was not used up at the usual rate. Moreover there was a need to store the growing stocks of unsold finished products, so that there was no available storage space for the two shipments, had they arrived at the 2 contractual discharge ports.

56. When Limbungan cancelled the first two Classic voyages on 4th November, Lion's evidence was that the storage yard at Labuan was completely full and once the next vessel due to arrive on 20th November had discharged at Port Kelang, the stock yards there would also be completely full. It was said that there were no other places in either port at which the Classic cargos could be stored or to which the existing stocks of finished products and raw materials could be moved, so as to make room in the storage yards for a Classic cargo. In consequence it was impossible for the Classic cargos to be unloaded at either of the ports named in the COA. It was also said that Lion subsequently ceased production altogether between the end of November and the beginning of March and has only been operating at 60% capacity since then.

57. The impossibility of discharge appeared to be predicated upon the impossibility of storage in the Lion Group storage yards, which did not, without more, appear to follow. On instructions, Mr Vernon Flynn QC told me that it was physically impossible to discharge the vessels and that various methods of discharge permitted in the COAs were physically or legally impossible and/or could not be permitted by the port authorities. I allowed further evidence to be adduced after the end of the hearing which was forthcoming within a day or so, in the shape of an eight page statement from Mr Ee Beng Guan, the general manager of the Legal and Secretarial Department of the Lion Group. From this evidence it appeared that a Capesize vessel could only discharge at the anchorage in Port Kelang and there had to discharge into barges which were taken up river for about fifty miles to the Lion Group Plant where they would be discharged into the Lion Group yards. It is said to be physically impossible for the vessel to discharge at the port itself and a floating crane was brought along side the ship for discharge to take place. Trans-shipment is neither customary nor safe and said to be impossible in practice at the port. It was said that the cargo could only be discharged into barges which went to the Lion Group Plant for discharge into trucks and then into the storage yard. Therefore there was no physical way to discharge the vessels at Port Kelang at all once those yards were full. Equally, at Labuan there was only one private jetty at which a Capesize vessel could discharge and there, a crane removed the cargo to put it onto a conveyer belt which led directly to the steel mills' reinforced storage yard, there being no other possible place or method of discharge.

58. Mr Guan is the General Manager of the Legal and Secretarial Department of the Lion Group and his evidence related to the operations of the Lion Group as an entity. As counsel for Classic points out, Limbungan and Lion are part of the same group, operate in conjunction one with the

other, have an extremely close relationship and yet rely upon their separate legal personalities for the purpose of the argument on frustration and force majeure. It is noticeable that no documentation has been disclosed in evidence to show the exact nature of the relationship between Limbungan as the chartering arm of the Lion Group and the Lion entities which were to act as receivers of the cargos and the users of it in the manufacturing processes for which they were purchased. The court must nonetheless focus upon the COAs and the question of discharge under those COAs by Limbungan which is said to depend upon the lack of storage capacity suffered by other companies in the Lion Group.

59. Classic submits that the evidence does not disclose a defence of frustration or force majeure with any real prospect of success, even if it is assumed that the evidence is true. The court has to proceed on the basis that it is true for the purpose of seeing whether or not there is an arguable defence, in the absence of any evidence to show otherwise. The nominations made by Classic and accepted by Limbungan on 30th September provided for loading dates of 15th-24th November and 26th November-5th December with an anticipated overall voyage duration of about 53-55 days, including an 8 day discharge. The two vessels nominated could therefore have been expected to arrive at the discharge ports sometime in January. The evidence of Limbungan appears to show that on 4th November, the date when Limbungan cancelled the first two Classic voyages, the storage yard at Labuan was completely full and that after the arrival of the MV China Peace, due at Port Kelang on 20th November, with a cargo of 170,000 MT, the Lion Group stockyards there would be full to over flowing with cargo spilling over into the swamp areas. It is clear that the "Lion Group" had chosen to discharge both the MV Ikan Bilis and the MV China Peace at Port Kelang, the cargos of which, on the figures given in the evidence would appear to fill up the Lion Group's storage capacity there. That quantity is said to represent approximately 2 months' production for the plant there. The Lion Group, on the evidence ceased production from the end of November to 1st March but there is no evidence as to how the situation was perceived at the beginning of November when production was still in progress and material must have been taken from the yards for that purpose. The Lion company which takes the raw iron ore pellets, Lion DRI Sdn Bhd manufactures direct reduced iron which is a feed stock for making higher quality making steel products by way of electric furness, especially flat products such as hot rolled coils. The direct reduced iron is mainly used by Megasteel, an associated group company. Antara Steel Mills and Lion DRI are the two regular receivers to which Limbungan chartered ships deliver. It is plain from the table adduced in evidence by Mr Joiner that production of flat steel continued throughout the period from November 2008 to February 2009 and there was limited production in December and February by Antara Steel Mills in Labuan.

60. Although the storage yard at Labuan was said to be completely full at 4th November 2008 with a capacity of about 380,000 MT, absent a shut down in production, by late December there would ordinarily be space to accommodate the cargo of one of the vessels.

61. Lion's evidence proceeds on the basis that the yards would remain full throughout December and January and that this was known to be the case in early November when the two shipments were cancelled. There is no evidence of any decision taken before the Lion DRI's cessation of production on 26th November nor of the perception of the future prospect at that stage. Since production has started again, albeit at 60% capacity, it appears that the vessels, on arrival in January, might have been subject to significant delay before discharge became possible. The COA provided for a demurrage rate of $100,000 a day and although the case has been put on the basis of impossibility of discharge, it appears that the case must really be one of frustrating delay affecting discharge which would depend upon the position as known and anticipated on 4th November when the shipments were cancelled. The evidence of the messages exchanged on 4th November fall well short of clearly establishing the position as seen at that time.

62. Moreover Lion's evidence works on the basis that, once the storage yard was full there was

no possibility of discharge from the vessel itself. There is however evidence that when the China Peace was discharged, the cargo spilt over into the swamp areas which suggests that discharge is not strictly confined to the specially strengthened storage yards for ore. Furthermore, although the evidence shows that the ordinary method of discharge in Port Kelang is into 22 barges carrying 3,000 MT each, which are towed up river to the Lion DRI plant, discharged and then returned to be used a further twice for a Capesize vessel, the assumption of impossibility proceeds on the footing that the cargo must be used at the plant as opposed to being disposed of in some other manner. Whilst of course the receivers would wish the cargo to be so delivered for commercial use, there is an absence of evidence about the possibilities of taking the cargo out of the barges for all forms of disposal, however uneconomic. As Classic submits, impossibility of storage, even if proved, does not establish impossibility of discharge. To establish the physical impossibility of discharging a vessel is a high burden and here the evidence appears to show that the barges could be towed up the river to the Lion DRI factory where a shore crane could be used to lift the iron ore off the barges and into trucks which would ordinarily tip the cargo into Lion DRI specially fortified storage yards. There is no evidence that the cargo could not be disposed of from the trucks elsewhere, albeit doubtless uneconomically and with resultant waste. Whilst the evidence refers to a limited number of trucks available and Mr Guan says that he is of the view that once the storage yard at Lion DRI was full, there was no physical way to discharge the vessels, I cannot be satisfied, on the evidence, that this is the case.

63. Similarly at Labuan, though it is said that, if the storage yard is full, there is nowhere for the cargo to go, it is hard to see that all the possibilities have been eliminated.

64. Because the absence of any disclosure of the contracts between Limbungan and Lion DRI or Antara Steel Mills, there is no evidence about the obligations of the receivers to Limbungan and what contractual rights Limbungan had to compel the receivers to take delivery of cargo. There is no evidence of any force majeure clause in any such contract nor of the existence of any contracts at all. Whilst Limbungan wishes to be treated as a separate entity for the purpose of these proceedings, if the reality is that decisions are made for the benefit of the group as a whole, there is every possibility that any supposed frustration would be "self-induced" within the meaning of the phrase as explained in The Super Servant 2 [1990] 1 Lloyd's Rep 1 at page 10. Plainly decisions about discharging vessels in November at Port Kelang and Labuan (one vessel was diverted from the latter to the former), about filling the storage yards, about rates of production of different products and about temporary or permanent shut down of the plant were taken in circumstances by individuals and companies within the Lion Group without any satisfactory evidence of how those decisions were taken being put before this court.

65. Plainly many questions arise in relation to the whole operation and the nature of the relationship between Limbungan, the chartering arm of the Lion Group and other companies in the Lion organisation whose decisions with regard to production, in the light of the economic conditions, appear to have created the alleged difficulties in discharge.

66. Lion's case on force majeure cannot fare any better in putting forward a failure to discharge resulting from a cause beyond Limbungan's control, notwithstanding the wording which refers to such an event directly affecting performance. Either Limbungan was prevented from discharging the vessels or it was not, whether for a limited period, a frustrating period or at all. The evidence is the same for this purpose as for its argument on frustration.

67. On the face however of the evidence produced, I cannot say that Lion does not have some prospect of successfully defending the claim on the grounds of force majeure or frustration but, in my judgment, it is improbable that it will succeed, having taken the chance to have two bites at the cherry in order to produce its best case. Whilst Classic cannot succeed on its application for summary judgment, it seems to me that this is an appropriate case for making a conditional order within the meaning of para 24PD 5.1(4), requiring a payment into court of the sums claimed. The

sums in question are large, but Lion was put on notice of this alternative application by Classic and was given the opportunity of producing evidence as to its means, along with the adduction of further evidence of the facts allegedly giving rise to force majeure or frustration. Lion has put in no evidence to say that it would have difficulty in making such a payment.

Quantum

68. Classic has calculated its claim on the basis of contract against market rate using the Baltic Capesize Index. Lion does not accept the calculations produced. Mr Joiner states that "without waiving privilege" he has consulted an expert who informed him that the index does not provide sufficiently accurate evidence of the freight rate available in the market on a particular day and that he expected that Lion would be able to call expert evidence to the effect that Classic's claim was overstated. That he said gave rise to a factual issue which needed to be resolved at trial. In my judgment such an assertion is wholly inadequate in the context of an application for summary judgment. If there are points to be taken about the Baltic Capesize Index then at the very least the basic points should be set out by an expert so that the court can see that there is some substance to the issues raised. In the absence of any such evidence, I cannot consider that there are any realistic prospects of success on this point.

69. Lion also argued that even if the COA was not frustrated as at the date of cancellation, it must have been frustrated later, and that damages had to be assessed on that basis- see The Golden Victory [2007] 2 Lloyd's Rep 164 (HL), but this argument turns on the self same issues that I have referred to earlier and the absence of sufficient evidence from Lion and Limbungan to make the point good. Furthermore, by December, the ships would have loaded and freight would have been earned, as it was specifically earned under the COA, five days after signing Bills of Lading.

70. An argument was raised with regard to The Achilleas [2008] 2 Lloyd's Rep 275. Lion submitted that the House of Lords had set out a new test for the recoverability of damages for breach of contract, namely whether the loss was a type of loss for which the party in breach could reasonably be regarded as having assumed responsibility. Because of the extreme volatility of the freight market in late 2008 it was submitted that Limbungan could not be liable for the full extent of the loss claimed by Classic which reflected the full 95% fall in freight rates, but only for the loss flowing from a fall in freight rates for vessels of the kind in question, of the magnitude which the parties would have contemplated, at the time of contracting, as being likely to occur in the ordinary course of things.

71. Because I have come to the view that Lion has an arguable case on frustration/force majeure, I only need to deal with this point in the context of the conditional order, which I propose to make. I would be highly surprised, if this was the effect of their Lordships' decision. I note that Flaux J was wholly unpersuaded that the House of Lords had changed the law on remoteness – see The Amer Energy [2009] 1 Lloyd's Rep 293.

72. In the context of this action the exact formulation of the test of the remoteness does not seem to me to matter. The House of Lords had to grapple with two different types of loss which arose on the facts. The contest was between the market rate/contract rate differential on the existing charter for the period of overrun on late delivery of the vessel and the lost profits for the whole duration of the follow-on voyage as a result of that late delivery. Their Lordships, for differing reasons, held that the former was the correct measure of damages. Here, there is only one kind of loss to be considered, namely the difference between contract and market rate for the two vessels which were cancelled. It is only the extent of that loss which is in issue, if liability is established. This raises the classic distinction, recognised in numerous prior authorities between type of loss and extent of loss. There is no issue here with regard to knowledge of special contracts or special profits. The issue is which of two parties is to bear the loss between the contract rate and the market rate. Both vessels were on time charter and no question arises as to

extrication by Classic, as disponent owners from those contracts. The claim is one based on the simple principles expressed in The Elena D'Amico [1980] 1 Lloyd's Rep 75. Whatever test one adopts, in the context of breaking two fixtures of this kind, it cannot be said that the type of loss is outwith the contemplation of the parties at the time of entering the contract, if one of them should break it. This is a Hadley v Baxendale rule 1 case.

73. Lord Hoffmann in The Achilleas at paragraphs 14,15 and 23 referred specifically to the "kind" or "type" of loss for which the contract breaker ought fairly to be taken to have accepted responsibility and said that this was to be measured by what "the law regards as best giving effect to the express obligations assumed" (paragraph 16). At paragraph 21 he again stressed the general acceptance that a contracting party will be liable for damages for losses which are unforeseeably large if loss of that type or kind falls within one or other of the rules in Hadley v Baxendale and stated that there was an inclusive principle: "If losses of that type are foreseeable, damages will include compensation for those losses, however large". He then referred to other cases which showed that that might be an exclusive principle so that a party might not be liable for foreseeable losses because they were not of the type or kind for which he could be treated as having resumed responsibility.

74. At paragraph 32, Lord Hope also said that the test was whether the loss was a type of loss for which the party can reasonably be assumed to have accepted responsibility. In the next two paragraphs he referred to market fluctuations "in the ordinary course of things" and that the contract rate/market rate differential could be presumed to be something for which the party in breach had assumed responsibility in the context of delay. He drew the distinction between that and the damages claimed for the lost profits over the whole of the follow-on charter which resulted from special arrangements entered into between the owners and the new charterers, of which the old charterers were unaware.

75. Lord Rodger at paragraph 52 referred to the importance of not losing sight of the basic point that, in the absence of special knowledge, a party entering into a contract can only be supposed to contemplate the losses which are likely to result from the breach in question – in other words those losses which will generally happen in the ordinary course of things if the breach occurs. Although he placed emphasis upon the extreme volatility of the market in that case, at paragraph 60 he drew attention to "the kind of loss" for which the owners were claiming damages which occurred because of a combination of the extremely volatile market and the particular arrangements made by the owners for the follow on fixture.

76. At paragraph 84 Lord Walker held that it was an error to focus on the foreseeability of the type of loss and that the question was whether loss of the kind in question should have been within the defaulting party's contemplation. Lady Hale agreed with Lord Rodger that the parties would not have had the particular type of loss within their contemplation.

77. In my judgment, notwithstanding references to the unforeseen degree of fluctuation in the market, not one of their Lordships was saying that, if the type of loss was within the contemplation of the parties or that for which the party in breach must be assumed to have accepted responsibility, some of it might be irrecoverable because the extent of it was unexpected.

Conclusion

78. Classic's application for summary judgment therefore fails since factual issues arise in relation to the force majeure/frustration argument, which cannot be properly resolved at this stage of the proceedings. For the reasons given however it is appropriate to order a payment in which reflects the improbable prospects of success and which amounts to the sum total claimed of $18,366,330.50. This view is reinforced by the view that Limbungan itself took on 13th November 2008 when stating that it would "definitely compensate the damages to owners".

Despite this, I do not think it appropriate to award the costs of the hearing to Classic and that the appropriate order at this stage is costs in the case. I do however consider that the sum to be paid in should secure Classic in respect of the costs of the action, whilst the costs of the stay applications should follow the event. If there are factors of which I am unaware which bear on the question of costs, the parties can address me on them, but, without more, those are the conclusions at which I would arrive.

79. There remains the issue of double security in the light of the Rule B attachment in New York which will not necessarily respond to a judgment against Limbungan, because it is predicated on an alter ego argument against Lion DRI and attaches approximately $17.3m of the latter's assets. This attachment operates in respect of the 2 shipments with which I am concerned but also a third shipment which was cancelled, the first shipment due in 2009, where there is a claim for some $5.729m. If there is to be an order for payment in of approximately $18.5m to secure Classic's claim in this action plus costs, I would require the security in the Rule B attachment to be reduced so that it only covered the $5.729 claim which would be unsecured here. If the parties agree that, instead of payment into court, a first class bank guarantee be given or the sum be held in escrow to earn a better rate of interest, that would be acceptable to the court.

80. If the parties can agree the figures in respect of future costs, the figure to be paid in and the amount to remain attached in New York, so much the better. If not I will determine such issues on the formal hand down of this judgment.